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AUTOMOBILE COLLISION INSURANCE.

Many authorities will be found in this field of the law determining when vessels are "in collision," and the holdings are far from uniform. Two extreme ones will be noted: The Moxey, 17 Fed. Cas. 940, and Wright v. Brown, 4 Ind. 95, 58 Am. Dec. 622. In the first of these cases the injury had been done to the vessel at its mooring by being violently rubbed against by another craft. In disposing of it, Judge Betts said:

"I do not think the term 'collision,' as used in the maritime law, is to be construed with the absolute strictness contended for by the claimant's counsel. An injury received by a vessel from being violently rubbed by another, or pressed by her with force against a pier or wharf, as in this case, may, I am inclined to think, be recovered for in admiralty under the general charge of collision, as well as where the injury is derived directly from the headway of a vessel under navigation, or drifted against her."

In the second of these cases a flat boat was sunk at its wharf by violent waves produced by the Steamboat "Wisconsin," owned by the defendants. The Court treated it as a case of collision, saying:

"We shall consider this case as one of collision between the vessels; for it must be the same thing in principle, whether the steamboat ran upon the flat boat, or forced some other object upon it, to produce the injury."

The language of the Court in London Assurance v. Campanhia De Moagens, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113, is in consonance with the generally accepted understanding of the term. It was there said:

"As to the first, we think that the vessel was 'in collision' within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. We see no distinction, so far as this question is concerned, between a vessel at anchor and one at the wharf fully loaded and in entire readiness to proceed upon her voyage, with steam up and simply awaiting the regulation of some insignificant matter about the machinery before moving out. If, while so stationary (at anchor or at wharf), the vessel is run into by another, we should certainly, in the ordinary use of language, say that she had been in collision. * * *

"It is impossible, as we think, to give a certain and definite meaning to the words 'in collision,' or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy."

Plaintiff was insured against damage to his automobile by being in accidental collision with any other automobile, vehicle, or object. He was driving his car, and was practically stopped, preparatory to backing for the purpose of turning, when one side of the car gradually settled into the ground and the car tipped over, which caused it to be damaged in striking the ground. While the Court held that the rule *ejusdem generis* did not apply, it also held that there was no such collision as was contemplated by the policy.

"It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset or tip-over. If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset should be construed as a collision in the absence of a closer association of the two incidents in popular understanding."

Referring to the definitions of the word collision, the Court said: "Upon its face this

appears to be good logic, but the conclusion is neither convincing nor satisfying. One instinctively withholds assent to the result. The reason is that it makes a novel and unusual use and application of the word 'collision.' We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular understanding a collision does not result, we think, from the force of gravity alone. Such an application of the term lacks the support of 'widespread and frequent usage'." Bell v. American Ins. Co., Wis. (1921), 181 N. W. 733.

We quote further from the Bell case as follows: "For the purpose of showing a practical construction of the contract on the part of the company, the plaintiff proved by the agent who delivered the policy in question that the company provided, and sometimes used, another form covering the damage resulting from collision, which specifically excluded 'damage caused by striking any portion of the roadbed or by striking the rails or ties of street, steam, or electric railroads.' It is argued that because in some instances the company used a form specifically excluding damage caused by striking any portion of the roadbed, or by striking the rails or ties of street, steam or electric railroads, a purpose is indicated to assume responsibility by the use of the one form for damage excluded by the express terms of the other. Without stating whether, in our opinion, this testimony proves, or tends to prove, a practical construction of the contract here in question by the company, we are clear that it does not tend to prove a practical construction in harmony with that for which respondent contends. As we construe the clause quoted, it has no reference to damage caused by upsets, but it does exclude damage caused by projecting portions of the roadbed in the course of travel. It is common knowledge that an automobile traveling along a highway frequently strikes an unevenness of surface in the roadbed sufficient to do damage to the automobile, and this, we think, is the damage excluded by the clause in the other form sometimes used by the company. Such circumstance was held not to constitute a collision in Doherty v. Ins. Co., 38 Pa. Co. Ct. R. 119, and it seems not improbable that the form exempting such liability is sometimes used by defendant to avoid such contentions as were there made. We do not think the introduction of the second form throws any light on the proper construction of the contract before us."

In a Michigan case the specific terms of the policy were not before the Court, but it appeared that there was "full coverage collision" insurance, and the sole question for the Court's decision was whether or not there had been a collision. A truck was being loaded by means of a steam shovel, and when the loaded scoop was over and above the truck, it fell from some unexplained reason upon the truck, causing damage to the truck. After reviewing a number of authorities, the Court held that the damage was caused by collision, and that the policy covered the damage.

"Most collisions occur in the violent impact of two bodies on the same plane or level, and it is undoubtedly true that the word is more frequently used to express such impacts than other violent impacts. But we doubt that this fact has given to the word such a common understanding of its meaning as to exclude violent impacts unless upon the same plane or level. If one machine was going up and another going down a steep hill, and they came violently together, no one would hesitate for a moment in using the word 'collision.' At what angle must the impact occur to make the use of the word 'collision' inappropriate and relieve the insurance company from liability? We are persuaded that the better rule, the safe rule, is to treat and consider the word as having the meaning given it uniformly by the lexicographers; that where there is a striking together a violent contact or meeting of two bodies, there is a collision between them, and that the angle from which the impact occurs is unimportant. In

the instant case there was the violent striking together of the truck and the heavily ladened scoop; this was a collision within the meaning of the policy and rendered the defendant liable." Universal Service Co. v. American Ins. Co., Mich. (1920), 181 N. W. 1007.

By the rule of construction known as *ejusdem generis*, general words following particular words are limited to other species of the same genus. "The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes." 36 Cyc. 1120. It has been held that the rule does not apply where the specific words embrace all objects of their class so that the general words must bear a different meaning from the specific words or be meaningless. United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69.

The Wisconsin Court, in Wettengel v. United States Lloyds, 157 Wis. 433, 147 N. W. 360, Am. Cas. 1915 A, 626, applied the rule in the construction of a policy insuring against damage to the automobile in question "by being in collision with any other automobile, vehicle or object." In a later case, however, the same Court held that the words of the policy come within the exception, above noted, to the rule *ejusdem generis*. In part, the Court said: "We think the reason supporting the rule also dictates the exception, and that the exception applies to the words of this policy provision. Unless the word 'object' as here used be construed as including an object of a different class, it is meaningless, as the term 'vehicle,' it seems to us, includes every species within the genus. We are disposed to construe this provision as sufficiently broad to include a collision with objects other than automobiles or vehicles, and withdraw the contrary intimation made in Wettengel v. United States Lloyds, *supra*." Bell v. American Ins. Co., Wis. (1921), 181 N. W. 733.

C. P. BERRY.

NOTES OF IMPORTANT DECISIONS.

ESTIMATING INCOME TAX ON PROFIT FROM SALE OF CORPORATE STOCK, PART OF WHICH WAS ACQUIRED AS A STOCK DIVIDEND.—The difficulty in computing the income tax on shares of stock where some of the shares were acquired by means of stock dividend, is due to the decision of the Supreme Court of the United States in Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. Rep. 64, 9 A. L. R. 1570, holding that a stock dividend was not income.

The recent case of Towne v. McElligott, 274 Fed. Rep. 960, illustrates this difficulty. In that case it appeared that plaintiff owned shares in a corporation before March 1, 1913, and bought other shares thereafter. Later he received a stock dividend of 50 per cent upon all his shares. In 1918 he sold some of his shares, including those certificates which he had held on March 1, 1913, those which he had bought later, and some of those which he had received as a stock dividend. The tax was collected on the following basis: The plaintiff was charged with the gross sale price and credited on each share sold with the average cost of all the shares. This average for each share was computed by dividing the gross costs of all such shares by the number of the shares, including the shares declared as a stock dividend. The plaintiff argues that he should be credited with the actual cost of each certificate, computing the cost of the shares declared as a stock dividend at nothing. Thus the difference between the parties was whether, in estimating the taxpayer's credit on each share sold, the stock dividend shares should be brought into hotchpot with the shares on which the stock dividend was declared.

In holding that neither the plaintiff nor the collector had estimated the tax correctly, the Court said:

"The second point is raised by Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570, and must be ruled by its implications. Under the doctrine of that case a stock dividend is not regarded as new property at all. The old certificate represented precisely the same property as the old and new do thereafter. The old shares have proliferated, as it were, and although

the right they represented has now suffered a cellular division into smaller units of greater number, that is all that has happened. In view of this, it seems to me difficult to avoid regarding the old and new shares together as anything more than the evidence of a right which has persisted unchanged through the declaration of the dividend. It might have been possible to look at the new shares as declared from the surplus, and the surplus as not included in the old shares (at least not in the same sense as the new shares comprise it); but all such notions were expressly repudiated in the prevailing opinion. If so, each of the new shares, whether contained in the old or the new certificate, represents a part of the original property purchased and in selling the first certificate the stockholder has not sold the whole of what he originally bought, and should not be credited with the whole purchase price."

The Court then shows how such a tax should be computed. The Court said:

"An illustration will make clear what I mean. Suppose a man has certificate A, for 100 shares, bought at $100, certificate B, for 100, bought at $150, and certificate C, for 100, bought at $200. Suppose, further, that a stock dividend of 50 per cent is declared, and he gets one certificate D, for 150 shares, without paying anything. If he sells certificate A, he would be deemed to sell, not the whole of his first purchase, but only two-thirds of it, and he could credit himself with only $6,666. If he sold certificate B, he would credit himself with $10,000, and if certificate C with $13,333. If he sold certificate D, he could credit himself with $15,000, made up of $3,333 from his first purchase, $5,000 from his second, and $6,666 from his third. If, on the other hand, he sold only a part of certificate D, some arbitrary rule of apportionment must be adopted, allocating the shares sold among his purchases. The most natural analogy is with payment upon an open account, where the law has always allocated the earlier payments to the earlier debts, in the absence of a contrary intention. Accordingly, if all the new shares were not sold at once, I think the first sales should be attributed to the first purchases still remaining unsold when the stock dividend was declared. I do not see that this method will result in confusion in its application, and it carries into effect the underlying theory of Eisner v. Macomber, supra.

"The tax at bar was not computed quite in this way, because all the purchases before the declaration of the stock dividend were brought into hotch-pot. This I think was inconsistent with the theory of the identity of the shares involved in each purchase. It must, therefore, be recalculated, which the parties have kindly consented to do, if they are told the rule. The credits will be computed as follows: Upon each certificate held on March 1, 1913, two-thirds its value on that day; i. e., $230. Upon each certificate bought at $100. $66⅔. Upon each certificate for stock dividend shares, if issued against any specified earlier certificate, the same credit per share as the shares of that certificate. If the certificate of new shares is not so earmarked, or if but one certificate was issued for the new shares, then credit will be allowed of two-thirds the value of the shares on March 1, 1913, until half the number of shares have been sold, which the plaintiff held on March 1, 1913, and retained till the stock dividend."

WAS THE NINETEENTH AMENDMENT EVER LEGALLY RATIFIED?

That the Nineteenth Amendment, without conferring the power to grant or withhold suffrage upon the Congress, invades the "local self-government" of every state is self-evident.

It impairs the sovereignty of the people of all the states by partially depriving them of the right to decide for themselves who shall govern the state.

In the part of their constitution known as the "Bill of Rights" the people of Missouri, Rhode Island, West Virginia and Texas have forbidden their legislatures to impair their right of "local self-government" and the people of Tennessee have forbidden the members of their legislature to record the "assent of their state" to any Federal amendment proposed subsequent to their election.

The legislature of Tennessee, having been elected before the amendment was proposed by Congress, was incompetent.

The legislatures of Missouri, Rhode Island, West Virginia and Texas were also incompetent, by reason of the express provisions of the law which creates them.

When the people of all the states entered the Union they did not surrender to Congress the right to endow incompetent legislatures with "omnipotent" power simply by submitting Federal amendments to them for ratification.

The people did cede to the Congress the right to propose to their "legislatures," the very much restrained repre-

sentative bodies which "made the laws for the people," such amendments as legislatures were competent to ratify.

But by the alternative method provided in Article V for which there can be no other purpose, the people, in the same sentence reserved to themselves. acting directly in state conventions,[1] the power to ratify Federal amendments as to which the legislatures were not "competent."[2]

The people thus adopted the Constitution.

It was the only way they could have adopted it. For as Madison said:[3] "the legislatures were incompetent to the proposed changes" * * * "it would be a novel and dangerous doctrine that a legislature could change the Constitution under which it held its existence." Mason also agreed with Madison,[4] when he said: "The legislatures have no power to ratify it. They are the mere creatures of the state constitutions and can not be greater than their creators. * * * Whither then must we resort? To the people with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment that this doctrine should be cherished as the basis of free government."

How can any one suppose that the framers, when actually in the very act of following Madison's and Mason's advice to submit the Constitution to the people themselves acting directly in state conventions, nevertheless, in the same breath, by Article V, approved the other "novel and dangerous" method and authorized it to be applied at the pleasure of Congress? If so, then the alternative provided for state conventions was totally unnecessary.

In view of this it is legally doubtful if any of the twenty-three legislatures in the male suffrage states counted as ratifying were competent to so amend the "male clauses" of their state constitutions. It is legally certain that the legislatures of Missouri, Rhode Island, West Virginia, Texas and Tennessee were not competent to ratify. All this was self-evident before Hawke vs. Smith.[5] It is claimed, however, that the Supreme Court, in deciding that case, changed the source of political power in the United States from the people of the United States to Congress—turned the whole sovereignty of the people over to their creatures, the state legislatures, whenever Congress so willed. On the contrary all that Hawke vs. Smith decided, was that a state could not create new agencies for ratification other than those provided in Article V by making the legislature's ratification conditional on its being approved by popular vote. The legislature of Ohio was to proceed as before to ratify or reject. It was attempted, however, to add a new machinery (not contemplated by Article V) to comprise part of the act of ratification.

Article V contemplated what it says: "legislatures" restrained as they had always been by the law of their creation. It does not contemplate "legislatures plus a referendum," nor, on the other hand, "unrestrained, omnipotent" legislatures which had never before existed.

The people were certainly not giving to Congress in Article V the right to endow "incompetent" legislatures with unlimited powers to "unmake" the Constitution which they were not competent to approve. The people made the Constitution and the people alone can unmake it.[6]

(1) The only way they can act directly in their sovereign capacity, Mc Culloch v. Maryland, 4 Wheaton 403.

(2) Even the people thus acting directly are "incompetent" to deprive any State of its "equal suffrage in the Senate."

(3) 5 Elliott's Debates 355.

(4) 5 Ell. Deb. 352.

(5) 253 U. S. 221.

(6) Cohens v. Virginia, 6 Wheaton 389.

No implication can grant such power to Congress. The discretion to "propose" to legislatures does not change the term "legislature" or endow the body so named with new powers or abolish restraint inherent in the very nature of the political agent bearing that name.

It is true the legislatures derive their power to ratify, from Article V, such amendments as their people have not prohibited them from ratifying by clauses in their state constitutions. But when they come to act on a congressional proposal, each legislature speaks, not for people outside its state, but for its own state and people alone, otherwise it would record something other than "the assent of its state." In attempting to override the will of its own people incorporated by them into their organic law, it attempts to turn their refusal into an "assent."

If Congress can remove, in its discretion by proposing amendments to them, the shackles which the people of a state have imposed upon their legislature, then it is not the "assent of the state" which is recorded at all, but the unrestrained individual view of the members of its legislature perhaps elected (as thirty-four legislatures were here) before the proposal was made by Congress, perhaps called into special session (as thirty legislatures were here) and utterly lacking a popular mandate.

When the people of a state elect a legislature on other issues, do they give it blanket authority to disfranchise them, or to dilute their votes by enfranchising others, by means of any Federal amendment to that end, which may be subsequently "proposed" by Congress? The question answers itself, for in that event, the people of every state hold all their political rights at the discretion of Congress and omnipotent unrestrained legislatures.

When on the other hand the citizen votes for members of a state convention under the alternative plan provided by Article V, newly called to act in his name upon a Federal amendment necessarily previously proposed by Congress, the issue is always direct and certain and the popular mandate complete.

The provision in the Constitution of Missouri is as follows:

"Article II, § 3. We declare that Missouri is a free and independent state, subject only to the Constitution of the United States; and as the preservation of the states and the maintenance of their governments are necessary to an indestructible Union and were intended to co-exist with it, the legislature is not authorized to adopt nor will the people of this state ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this state."

The provision in the Constitution of Tennessee reads:

"Article II, § 32. No convention or general assembly of this state shall act upon any amendment to the constitution of the United States proposed by Congress to the several states, unless such convention or general assembly shall have been elected after such amendment is submitted."

The Texas Bill of Rights declares:

"Article I, §1. Texas is a free and independent state subject only to the Constitution of the United States; and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government unimpaired to all the states.

"§ 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government and all laws contrary thereto or to the following provisions shall be void."

As the only act of any Texas officials which could impair the right of local self-government of the state of Texas would be the action of the legislature of the state of Texas in ratifying a Federal amendment having that effect, such action is "excepted out of the general

powers of government," that is forbidden by §§ 1 and 29 of the Texas Bill of Rights.

The Rhode Island Constitution (1843) says:

"In order effectively to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare that the essential and unquestionable rights and principles hereinafter mentioned shall be established, maintained and preserved and shall be of paramount obligation in all legislative, judicial and executive proceedings.

"§ I. In the words of the father of his country, we declare 'that the basis of our political system is the right of the people to make and alter their Constitutions of government, but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all'."

No action of the Rhode Island legislature is "competent" to record "an explicit and authentic act of the whole people of Rhode Island," unless Congress, in defiance of the people of Rhode Island, can give it that competency, in which case it is certainly not "the free and voluntary assent of that state and her people to the Nineteenth Amendment," involving a change in the male suffrage clause of her state constitution.

Again the constitution (1872) of West Virginia says, Art. 1, § 2:

" The government of the United States is a government of enumerated powers not delegated to it, nor prohibited to the states or reserved to the states or to the people thereof.

"Among the powers so reserved to the states is the exclusive regulation of their own internal government and police and it is the high and solemn duty of the several departments of government created by this Constitution, to guard and protect the people of this state from all encroachments upon the rights so reserved."

If that is not a mandate to the legislature of West Virginia, which is certainly one of the "several departments of government" of that state, not to vote for a Federal amendment which attacks her "internal government" by taking from her citizens in part the right to choose the voters of that state, it means nothing. In face of that mandate to the people of West Virginia can any one contend that the action of the West Virginia legislature in voting to ratify the Nineteenth Amendment, expressed the free and voluntary "assent of that State" to its enactment.

The above five states were among the "male suffrage states;" that is, each of their constitutions also contained a provision limiting their suffrage to "males." These provisions were entirely consistent with the Federal Constitution. The members of these five legislatures were all bound, by their official oaths as such, to support and defend their state constitutions. Nevertheless, a majority in each *as counted,* violated the express provisions above quoted forbidding them to ratify, and sought to amend by indirection the "male clauses."

We are dealing here not with the effect of the Nineteenth Amendment, if validly enacted, upon state contitutions, which it would, of course, supplant, but with the "competency" the "power" of "legislatures" to validly record the "assent of their states" thereto. The assent of a particular state must be the free and voluntary act of the people of that state however much it must conform to the method Article V has fixed.

The "legislature" which acts (however it derives its power), is still composed of state officials elected, organized and acting in the orderly way prescribed by the constitution of that state and necessarily subject to all the limitations prescribed therein, limiting its power to meet, prescribing the place of meeting, its dual form of organization, the procedure and all its powers. In conformity with them and not otherwise it must record the "assent or dissent of its state."

If Congress can remove all the state restrictions on its powers and make it omnipotent, then its members are not members of the state legislature at all, but Federal officials acting under a Federal power and in no sense of the word would they record the "assent of their state" to a proposed amendment. The states as such, would cease to take part in amending the Federal Constitution.

There is no such political concept in this country as the people of the United States in the aggregate. The people do not speak, never have spoken, and never can speak in their sovereign capacity, otherwise than as the people of the states. There are but two modes of expressing their sovereign will, known to the people of this country, one is by direct vote—the mode adopted by Rhode Island in 1788, when she rejected the Federal Constitution. The other is the method here generally pursued, of acting by means of conventions of delegates elected expressly as representatives of the sovereignty of the people.

Now it is not a matter of opinion or theory or speculation, but a plain undeniable historical *fact*, that there never has been any act or expression of sovereignty in either of these modes by that imaginary community "the people of the United States in the aggregate."

Usurpations of power by the *government* of the United States there may have been and may be again, but there has never been either a sovereign convention or a direct vote of the whole people of the United States in the aggregate to demonstrate its existence as a corporate unit or political sovereignty. Every exercise of sovereignty by any of the people of this country that has actually taken place has been by the people of the states as states.

No respectable authority has ever had the hardihood to deny, that, before the adoption of the Federal Constitution the only sovereign political community was the people of each state. When the confederation was abandoned, when the Constitution was adopted by the people of the several states in their state conventions, the general government was reorganized, its structure was changed, additional powers were conferred upon it, and thereby subtracted from the powers theretofore exercised by the state governments; but the seat of sovereignty—the source of all those delegated and dependent powers—was not disturbed. The only change was in the form, structure and relation of their governmental agencies. There was a new *government*, but no new *sovereign people*" was created or constituted. The people, in whom alone sovereignty inheres, remained just as they had been before.

Madison said, in the Virginia Ratification Convention[7]:

"Who are parties to it? The people—but not the people as composing one great body, but the people as composing thirteen sovereignties."

Lee of Westmoreland said[8]:

"If there were a consolidated government, ought it not to be ratified by a majority of the people as individuals and not as states?"

Charles Pinckney in the South Carolina convention said[9]:

"With us the sovereignty of the Union is in the people." In McCullough vs. Maryland,[10] Marshall said for the Supreme Court, page 402:

"They (the people) acted upon it in the only manner in whch they can act safely, effectively and wisely on such a subject by assembling in convention. It is true they asembled in their several states—and where else should they have assembled?"

Then, answering his own question, he conclusively disposes of any idea of

(7) 3 Ell. Deb. 94.
(8) 3 Ell. Deb. 180.
(9) 4 Ell. Deb. 328.
(10) 4 Wheaton 316.

"mass people of the United States," in these words:

"No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compoundng the American people into one common mass. Of consequence, when they act, they act in their states."

Of course, it may be denied that there were no such political dreamers then or are not now. But, after all these years, does any one expect a new ultimate sovereign people—a mass people of America—different from and superior to the "people of the states" who ratified the Constitution to be now discovered, or that the primary sanction upon which Marshall based the very supremacy of delegated Federal power, the action of the people of the states in ratifying the Constitution, will now be broken down? Does anyone expect that legal sanction will now sustain this effort to "break down the lines which separate the states and compound the American people into one common mass" by striking down the restrictions which the only "people of the United States" known to Marshall's court or hitherto to American history, have placed upon their agents, their "legislatures," to preserve their ultimate sovereignty and self-government?

It is with the power of the sovereign people of the United States to unmake *their* Constitution, establishing *their* Federal government which they themselves created, that we are dealing with here. The question is whether that sovereignty has now been transferred to Congress and omnipotent state legislatures specially endowed by Congress, to the extent of depriving them, the only "people of the United States" who ever existed or can exist, of their inherent rights to determine for themselves who shall exercise their sovereignty, who shall constitute their electorate; in other words, who shall govern their states and elect their Congressmen and Senators.

If their Congress and legislatures, specially endowed by Congress, determine in whole or in part the suffrage qualifications for the people, (and in doing so brush aside the restrictions the "people" in their state constitutions have placed upon them as their agents)—if these omnipotent agents, holding no popular mandate, can even disfranchise the people directly, or what is the same thing, indirectly dilute their votes by enfranchising others; then the sovereignty of the people of the United States has become a myth. These "servants of the people" exercise without limit the people's own sovereign power whenever Congress makes a proposal which endows them with that right. This is the inevitable result of making a "scrap of paper" of the provisions of their state constitutions inserted by the people of the five states of Texas, Tennessee, Missouri, Rhode Island and West Virginia to protect themselves from this very abuse of power.

This disposes of the claim that the people of the states, in ratifying the Constitution, ceded away all right to curb or limit the "power" of their agents, the state legislatures, in ratifying Federal amendments, who, strange to say (according to the claim), though clothed with omnipotent power, still remain mere agents of the people of the states for recording the "assent of their states," but assert the right nevertheless, to negative the expressed will of their own people.

To whom, according to this startling theory, could the people of the states have ceded their sovereign rights when they ratified the Constitution? Not to the mass of people inhabiting the territory embracing all the states, for there was no such community in existence and they took no measures for the organization of such a comunity. If they had intended to do so the very style "United

States," would have been a palpable misnomer, nor would treason have been defined as levying war against *them*. Not to the government of the Union, even if Congress, which merely "proposes" to the states and the legislatures congressionally endowed with omnipotence by the proposal, can all be construed to be part of the Federal government for this purpose. For in the United States no sovereignty resides in government or in its officials.

As Daniel Webster said:[11]

"The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imparts no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us all power is with the people and they erect what governments they please and confer on them such powers as they please, none of these governments are sovereign in the European sense of the word, all being restrained by written constitutions."

In the Declaration of Independence, in the Articles of Confederation, in the Constitution of the United States, the corner stone is the inherent and inalienable sovereignty of the people.

To have transferred sovereignty from the people to a government would have been to have fought the battles of the Revolution in vain—not for the freedom and independence of the people of the states, but for a mere change of masters. Such a thought or purpose could not have been in the heads or hearts of those who moulded the Union, who sought by the compact of union to secure and perpetuate the liberties then possessed. Those who had won at great cost the independence of the people of their respective states were deeply impressed with the value of union, but they could never have consented to fling away the priceless pearl of the sovereignty of the people of their states for any possible benefit therefrom. And they did not.

The people made the Constitution and the people alone can unmake it.

It is therefore, submitted that the limitations which the people of Texas, Tennessee, Missouri, Rhode Island and West Virginia put upon their state legislatures in the organic law of their creation, are valid and binding. That those five legislatures were "incompetent" to ratify. The so-called Nineteenth Amendment therefore still remains a mere proposal without obligation or pretentions to it.

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New York, N. Y.

(11) Congressional Debates Vol. IX, Part 1, page 565.

The Vermont Legislature elected in November 1920, with the women of that state enjoying the elective franchise, ratified the Nineteenth Amendment making the thirty-eighth state as counted. Presumably the election officials of that state, as elsewhere, naturally felt constrained, under pain of possible criminal prosecution, of responsibility in civil damages and even of possible loss of office, to treat the secretary's proclamation of the Nineteenth Amendment as binding upon them. Thus were the women of Vermont themselves permitted to vote upon the question of whether they should be enfranchised by the Nineteenth Amendment. This seems like a political absurdity. The "sovereign people" of Vermont, thus made up of men and women constitute a radically different "state and sovereign people" from the "state and sovereign people of Vermont" to whom the Nineteenth Amendment was proposed for ratification. A new state and sovereign people was thereby constituted. This new state can hardly give its "assent" in place of the "assent" of the pre-existing Vermont, unless we can raise ourselves by our own political boot-straps.

Into such confusion as this we will inevitably run, whenever by "suffrage" amendments, we attempt to disturb the sovereignty of the people.

MASTER AND SERVANT—DISEASE AS ACCIDENT.

UTILITIES COAL CO. v. HERR.

132 N. E. 262.

(Appellate Court of Indiana, Division No. 1, Oct. 4, 1921.)

An occurrence which merely hastens an existing disease to its final culmination will be deemed an "accident" within the meaning of the Workmen's Compensation Act, and, where such occurrence arises out of and in the course of employment, compensation will be awarded.

BATMAN, J. This appeal involves an award in favor of appellees, arising from the death of

Eli A. Herr, an employee of appellant. The only question presented relates to the sufficiency of the evidence to sustain the finding that on the date named said Eli A. Herr "received a personal injury by accident arising out of and in the course of his employment, resulting in his death." Appellant contends that the evidence does not establish this fact, but, on the contrary, conclusively shows that the death of said employee was the result of chronic heart disease, and not of any accidental cause whatever. The evidence tends to show that on June 26, 1920, appellant had a number of men employed in mining coal, including the decedent. On the morning of that day, the decedent, with other employees of appellant, went down into its mine to engage in their usual work. When they reached the bottom of the mine and came to their working place, they found the same so full of smoke that they could not remain therein with comfort or safety, and by reason of that fact returned to the top of the mine. Immediately after the decedent came out of the mine, he walked a short distance to a stairway, sat down on one of the steps, and then fell over. On being carried into the office he was found to be dead. On examination at an autopsy held by the coroner, it was found that the decedent had been afflicted with a serious chronic heart disease. The smoke which caused the decedent and other employees of appellant to leave the mine had been produced by firing explosives early that morning for the purpose of loosening the coal, so that it could be more easily and more rapidly mined, and sufficient time had not elapsed for the air to become pure again before the men went down to work. Where air is impregnated with smoke of this kind, it causes a bad effect to persons who breathe it, and if inhaled too long will prove fatal. It does not affect all persons alike, and its evil results are not always immediate. Appellant's brief discloses that one witness testified that it "causes distress all over; causes your heart to jump and beat as fast as you can count; affects your lungs and your head, and you get weak all over." The smoke on this occasion affected a number of the men who went down into the mine that morning with the decedent to work. It caused one to become sick at his stomach and to have a headache. He was partly overcome by the bad air, and had to take his time in walking to the cage at the bottom of the mine. It caused another to feel dizzy and light. He was to some extent overcome by the bad air, and was attended by a physician. It caused another to have a headache and to vomit. As he walked along the bottom of the mine, "he didn't have breath enough to walk only a few steps at a time." It made his heart jump and made him dizzy and blind. He got so sick he could not go, but did not become unconscious. After he came out of the mine he was treated by a physician. It made another one sick. He left the mine because of the bad air, and was sick all that day. He felt better the next day, but was not normal.

Appellant bases its contention, that the evidence does not sustain the finding in question, chiefly on the testimony of two physicians who attended the autopsy. This testimony consists of their opinions that the death of said Eli A. Herr did not result from inhaling the impure air in the mine, but from the chronic heart disease. However, if their opinions be accepted as the true cause of his death, it does not follow that the finding under consideration is not sustained by the evidence. This is true for the reason that an occurrence, which merely hastens an existing disease to its final culmination, will be deemed an accident within the meaning of the Workmen's Compensation Act (Laws 1915, c. 106), and where such occurrence arises out of and in the course of an employment, compensation will be awarded. In re Bowers (1917), 65 Ind. App. 128, 116 N. E. 842; Indianapolis, etc., Co. v. Coleman (1917), 65 Ind. App. 369, 117 N. E. 502; Retmier v. Cruse (1918), 67 Ind. 192, 119 N. E. 32; Puritan, etc., Co. v. Wolfe (1918), 68 Ind. App. 330, 120 N. E. 417; Indian Creek, etc., Co. v. Calvert (1918), 68 Ind. App. 474, 119 N. E. 519, 120 N. E. 709. There is no direct evidence that the smoke-laden air, inhaled by the decedent on the occasion in question, hastened his death because of the diseased condition of his heart, but such evidence is not necessary in order to establish that fact, if other proven facts will warrant such an inference. Bronnenberg v. Indiana, etc., T. Co. (1915), 59 Ind. App. 495, 109 N. E. 784; Carter v. Richart (1917), 65 Ind. App. 255, 114 N. E. 110. Directing our attention to the facts set out above, we observe that a man, afflicted with a serious heart disease, went down into a mine, and found the air of his working place filled with smoke that rendered it unfit to breathe, and seriously affected a number of his fellow workmen; that after remaining a short time he left the mine because of the impure air, and on reaching the top he was in such condition that he expired within a short time. It was the province of the Industrial Board to draw any reasonable inference from such facts. It evidently drew the inference that the same elements in the air of the mine, which caused

other workmen to become deak, dizzy and blind, to have rapid pulsations, headache and shortness of breath, to become sick and vomit, so affected the decedent that death followed, because his diseased heart was unable to withstand the added burden placed on it by inhaling the smoke-laden air while in the mine, and in making an effort to escape from its evil effects. With such an inference in support of the finding in question, it is fully sustained by the evidence. We are unable to say that it is not a reasonable inference, and therefore we have no right to disregard it, although we might consider a contrary inference equally as reasonable. Bilskie c. Bilskie, 69 Ind. App. 595, 122 N .E. 436; Bimel Spoke, etc., Co. v. Loper (1917), 65 Ind. App. 479, 117 N. E. 527; City of Linton v. Jones, 130 N. E. 541.

The award is therefore affirmed.

NOTE—*Disease Following Injury as "Accident" Within Workmen's Compensation.*—Where a workman's neck was cut while being shaved in a barber shop, and the following day, while handling hides, anthrax germs entered through the cut, causing his death, it was held that the death was due to an injury arising out of the employment. Eidridge v. Endicott Johnson & Co., 189 App. Div. 53, 177 N. Y. S. 863, 4 W. C. L. J. 621.

Where an employee strained himself by lifting, and later died from pneumonia, which the evidence established was due to the injury, the board was justified in finding that the subsequent death was due to an accident arising out of and in the course of the employment. Folts v. Robertson, 188 N. Y. 359, 177 N. Y. Supp. 34, 4 W. C. L. J. 429.

Where an employee suffered an accidental injury and later developed hysterical insanity, a finding of the board that the insanity was due to the injury out of the employment was sustained by the evidence. Kingan & Co. v. Ossam, Ind. App., 121 N. E. 289, 3 W. C. L. J. 276.

An employee suffered a frost-bite while performing his duties in the service of the master and developed erysipelas, as the result of the injury, which caused his death. His death was held to be due to an accidental injury arising out of the employment. Larke v. Hancock Mut. Ins. Co., 90 Conn. 303, 97 Atl. 320.

Where a workman stepped on a rusty nail and later contracted tetanus by the entrance of germs through the wound, it was held that he sustained an injury arising out of his employment. Putnam v. Murray, 174 App. Div. 720, 160 N. Y. S. 811.

This subject is exhaustively treated in the excellent work of Mr. William R. Schneider on Workmen's Compensation, §§ 178 and 291. Mr. Schneider's book is not yet off the press, but he was kind enough to permit access to the proof sheets.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

Florida—Orlando, June 15 and 16, 1922.

Iowa—Sioux City, June 22 and 23, 1922.

Missouri—Kansas City, Nov. 30, Dec. 1 and 2, 1921.

Nebraska—Omaha, Dec. 29 and 30, 1921.

Oklahoma—Oklahoma City, Dec. 29 and 30, 1921.

Rhode Island—Providence, Dec. 15, 1921.

SYMBOLIC DELIVERY OF POSSESSION.

A recent decision of interest, Wrightson v. McArthur & Hutchisons, Limited (ante, p. 553), illustrates a doctrine of law which does not arise so often in the twentieth century as it did in the eighteenth and nineteenth. We refer to the common law principle of "Constructive Delivery," or—as it is sometimes called —"Symbolic Delivery." It is hardly necessary to say that early law found a stumbling-block in the conception of any transfer of property which did not involve actual delivery of possession. In the earliest forms of conveyance of land, the grantor took the grantee upon the land and put him in possession. Where this proved inconvenient, later on, he took him in sight of the land and delivered to him a part of the land, i. e., a clod or twig actually removed from it, in lieu of putting him in actual possession of the whole. Here, again, there was delivery of actual possession, although only of a part, namely, the clod. Later on the grantor was content to hand the grantee any clod or twig, or even an office ruler, in the presence of witnesses, and accompanied by the solemnity of a written conveyance under seal. At this stage, the delivery has become merely symbolic; there is no longer any actual delivery of possession. Nowadays the document of title is signed, sealed and delivered; this is purely symbolic delivery. But it is interesting to note that even today a verbal conveyance is not permissible, nor yet one which is not completed by some delivery to someone, of the document of title. Our conveyancing system has not yet outgrown early symbolism. A clear vestige of it still remains, although of course, by statute corporeal hereditaments lie in grant as well as in livery.

A parallel development took place in connection with the conveyance of personal prop-

erty, at any rate of chattels. If A transfers a chattel to B, it is still necessary that there should be some form of delivery. This may be—

(1) Actual delivery of the possession of the chattel to B.

(2) Constructive delivery, *e.g.*, delivery of a sample of goods in token of the whole.

(3) Symbolic delivery, *i.e.*, delivery of the means of access to and control of the goods, *e.g.*, the key of the warehouse in which they are stored.

(4) Documentary delivery, *i.e.*, delivery of a document of title to the goods, such as a bill of lading, or a dock warrant, or a wharfinger's receipt note comprising the goods.

(5) Delivery by bill of sale, *i.e.*, a document purporting to transfer the goods either at the date of signature, or by conferring on the grantee a power to enter and take them.

Now in all these cases it is easy to see that the old notion, that there can be no transfer of chattels without delivery, is still at the root of the legal rules in the matter. Such delivery may be actual or symbolic; but there is always at least the vestige of a legal fiction that actual delivery of the physical possession of the goods has taken place. In the case of choses in action, which can only be transferred by an assignment in writing, the doctrine also clearly survives. The assignment in writing is not a mere ceremonial requisite to witness the existence of a contract, as is often absurdly stated in legal textbooks; it has nothing to do with contract at all. The writing is not required as a matter of solemn evidence as is often erroneously supposed. The writing is required because it is a symbol of delivery, the only kind of delivery possible in the case of an intangible an incorporeal form of property, such as a chose in action necessarily must be.

If the origin and historical development of this idea of constructive or symbolic delivery is always borne in mind, many of the difficulties which occur in connection with it will tend to disappear. There are many classes of cases in which the doctrine may become important; but the following are the three which most frequently occur:—

(a) Transfer of the property in goods bargained and sold. The risk, of course, passes with the property, so that the question of such transfer is very important.

(b) Registration of documents passing the property in goods, which remain in the apparent possession of the grantor, *i.e.*, bills of sale under the statutes of 1878 and 1880.

(c) Charges on chattels belonging to a company, which require to be registered in order that they may be valid against creditors upon liquidation under the Companies (Consolidation) Act, 1908, s. 93 (1).

It was in connection with this third class of case that Mr. Justice Rowlatt had to decide Wrightson v. McArthur and Hutchisons, Limited (supra). Here a company was in liquidation. In a compartment on its premises the liquidator found goods which were claimed by the plaintiff. The company had agreed to secure the plaintiff against loss on a certain contract undertaken by him, and sent him a letter agreeing to set aside a quantity of goods in a special compartment of their premises for his benefit in respect of their liability to indemnify him. They set aside the goods, locked the compartment and handed him the keys. Then they sent him another letter in which they said: "You can have the right to remove same as desired." The plaintiff claimed that these goods had been delivered to him and were in his physical possession, as possessor of the key, at the date of the liquidation. On the other hand, the liquidator took the view that the letter created a charge on the chattels, and that such charge required registration under s. 93 (1) of the Companies (Consolidation) Act, 1908. As it had not been registered, the liquidator claimed that the charge was void, and that the goods were available for the benefit of all the creditors.

Nof if the only effect of the letters which passed between the parties was to create a charge in favor of the plaintiff on goods remaining in the company's possession, it is quite clear that such a charge must be registered. Ingenious attempts were made to get out of this by the plaintiff. It was suggested that the real transaction was a *verbal* pledge of the goods, and that a "pledge" is not a "charge" within the meaning of the statute, and so does not require to be registered. Morris v. Delobbil-Flipo (1892, 2 Ch. 352). But, while it is true that a "pledge" is a common law conception, whereas a "charge" is the creature of equity, it is not possible seriously to suggest that a common law "pledge" is not also a "charge" in equity. Pledge is a form of bailment, and every bailment is a form of common law trust. Re Hardwick, Ex Parte Hubbard (17 Q. B. D. 690); equity gave additional remedies to the *cestuis qui trust*, but did not create the trust which it enforced. Equity created many new forms of "trust" and "charges" unknown to the common law and unenforced by it; but it did not, in so doing, create a

wholly novel juridical conception. A "charge," then, cannot be said to be so purely the creature of equity that no common law bailment or pledge can satisfy its definition. If a common law pledge fulfils all the requisites of an equitable "charge," then it is a "charge," and requires—in a proper case—registration, as such, under s. 93 (1) of the Act of 1908.

Again, it was argued on behalf of the claimant that, supposing the transaction was not a verbal pledge, but a conveyance in writing, nevertheless it escaped being a "charge" on another ground. No money was secured by the document. It was simply an agreement conferring on the grantee a right in equity to sue for and obtain a charge on the chattels in the event of the condition happening which entitled him to the goods. But such a contention is hardly arguable. An equity to sue for a charge is another name for an equity to a charge, and such an equity—upon part-performance by the grantee, such as had here occurred—is already a charge and treated as such in a Court of Equity. Clearly then, apart from other considerations which can easily be urged against this plea, the document is a "charge" and, therefore, registrable as such unless excluded from the operation of the section.

But these were only minor contentions. The case of the plaintiff really rested upon the contention that the possession of the goods had actually passed to him. The statute applies only in the case of "charges," *i.e.*, transactions in which the grantor remains in possession of the goods in which the grantee takes conditional right. Where the chattels are in fact passed out of the possession of the grantor into that of the grantee, there is no longer any such "charge" as the statute contemplates. The security arises under the delivery of possession.

The real point, accordingly, is simply this, whether or not there has been delivery of possession of the goods to the grantee. And this question of possession turns upon whether or not there has been any one of the five forms of delivery discussed earlier in this article. Now, it seems reasonably clear that there has been symbolic delivery of possession. Had the goods been transferred to a stranger's warehouse, and the key then handed to the grantee, there would have been a simple every-day case of symbolic delivery. Further, had all the goods in the defendants' premises been the subject of the grant, and the key of the whole premises handed over, the case would equally have been covered by authority as one of symbolical delivery, Hilton v. Tucker (39 Ch. D. 669). Here, however, the facts fall short of either of those possibilities. There was a partial delivery of goods, in a special compartment, locked away, accompanied by delivery of the key, and the grant of a license in writing to remove the goods at any time. Now, if we go back to first principles, the meaning of this is clear. The intention is to transfer complete control over the goods to the grantee, but it is inconvenient for him to take them all away. Hence there is delivery to him of the means of complete control over the goods, namely, the key and the license to remove. Obviously, the parties have done all they can to transfer possession without actual removal of the goods. This is therefore a symbolic delivery. Ward v. Turner (2 Ves. Sen. 431).

"Symbolism," all-dominant in the life of early man with his Totems and Taboos, has not yet completely spent its force. Some psycho-analyst of the future will probably derive interesting conclusions as to the nature of our civilization and the character of its superstitions from the survival of such "complexes" as are involved in this and other cases of legal symbolism.—*Solicitors' Journal.*

HUMOR OF THE LAW.

"To hell with John Lewis and Gov. Allen," says Alexander Howat. Which recalls the story of the controversy between the English bishop and the judge.

"You can only say, 'You be hanged'," boasted the bishop. "I can say 'You be damned'," "Yes," replied the judge, "but when I say, 'You be hanged,' you are hanged."—*Kansas City Star.*

Rookie Sentry: Halt, who's there?
Voice: Private Stock, Company C.
Rookie Sentry: Advance, Private Stock, and be sampled.—*American Legion Weekly.*

The following contemporary account of a hearing before Lord Eldon is worth recalling. The names of the counsel are familiar to the students of Vesey Reports (if any such remain):

Mr. Leach made a speech
  Impressive, clear and strong;
Mr. Hart made his part
  Tedious, dull and long;
Mr. Parker made that darker
  Which was dark enough without;
Mr. Cook opened his book,
  And the Chancellor said—I doubt—

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Actions**—Splitting Cause of Action.—In view of Negotiable Instruments Law, §§ 48, 82, 87, the prohibition in Code, art. 50, § 2, against instituting more than one suit on a joint and several note when the persons "executing the same" are alive and reside in the same county does not apply to prevent successive suits against accomodation indorsers, for the liability of an accomodation indorser of a note is secondary, and not joint, but several and he is not a person "executing the same" within the statute, although one assuming primary liability on the paper is undoubtedly one "executing the same." —Bradley v. Louisville Food Products Co., Md., 114 Atl. 913.

2. **Assignments**—For Collection.—Where defendant, though indebted to a corporation, loaned money to it in a sum less than his indebtedness, receiving its note therefor, and plaintiff, a creditor of defendant, brought suit against him serving writ of garnishment on the corporation, it might set up defendant's indebtedness to it as a defense, notwithstanding it had assigned its claim to a third person for collection; Rem. Code 1915, § 191, giving right of set-off against the assignee, being persuasive, and the rule of estoppel by assignment being applicable only between assignor and assignee. —Austin v. Wallace. Wash., 200 Pac. 566.

3. **Attachment** — Summons Unnecessary. — In proper instances, where civil actions are commenced, and service is obtained by attachment on defendant's property, and publication of a notice based on the jurisdiction thus acquired, the issuance of a summons is unnecessary.—Jenette v. Hovey & Co. N. C., 108 S. E. 301.

4. **Automobiles**—Collision.—Where plaintiffs, traveling in an automobile at a reasonable speed, had passed beyond the center of a street intersection, and were presumably out of the zone of danger from any vehicle approaching from the east and were struck by defendant's motortruck, which was exceeding the legal speed limit, at a place out of the line of travel from that direction, plaintiffs were not guilty of contributory negligence as a matter of law in failing to keep watch for the truck.—Simonsen v. L. J. Christopher Co., Cal., 200 Pac. 615.

5. **Bankruptcy**—Contribution.—Where a brokerage firm lawfully repledged securities pledged with them by their customers, and after the bankruptcy of the brokers the subsequent pledgee sold a portion of the securities to satisfy its debt and returned the others to the receiver in bankruptcy, the owners of the securities which were sold are entitled to contribution from those whose securities were returned, though they would not be so entitled if the returned securities had been unlawfully repledged, and therefore the owner of the securities which were returned cannot reclaim them from the receiver in bankruptcy.—In re Toole, U. S. C. C. A., 274 Fed. 337.

6. **Bills and Notes**—Admissibility of Evidence. —In an action on note given for exclusive right to publish musicians' directory in certain states, where defendant set up fraud and misrepresentation, testimony concerning acts and conduct of plaintiff subsequent to the consummation of the sale was properly admitted, to be considered by the jury in connection with the question whether the sale was induced by false and fraudulent representations.—Horowitz v. Kuehl, Wash., 200 Pac. 570.

7.——Definite Time.—Held, that an agreement to extend notes "until frost" is an agreement to extend to a definite time.—West Texas Loan Co. v. Montgomery, N. M., 200 Pac. 681.

8.——Holder in Due Course.—Where property was sold to defendant and a conditional bill of sale was given, later followed by an unconditional bill of sale, title to the goods passed by the unconditional bill of sale, and a defense to the note, given for the price of the goods, that certain of the goods sold were not owned by the seller, payee of the note, and had been taken from defendant by the real owner, although good against the payee of the note, was not good against plaintiff, a holder in due course.—Bowen v. Rury, Wash., 200 Pac. 789.

9.——Substitution.—In payee's action on a note executed by defendant to procure funds wherewith to promote a proposed corporation the payee's agreement to substitute for such note the note of the corporation held no defense, in the absence of an allegation that the note of the corporation was ever tendered to the payee. —Hale v. Gardiner, Cal., 200 Pac. 598.

10. **Brokers**—Commission.—Where a real estate broker procures a customer willing, ready, and able to purchase property offered for sale according to the terms of the offer, and the transaction is defeated on account of some fault of the principal, the broker is entitled to his commission, although the sale is not consummated.—Hutchins & Co. v. Sherman, Fla., 89 So. 430.

11. **Carriers of Goods**—Delay.—A railroad company is not estopped from relying on a provision of a bill of lading that the "amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment," because the consignees were not given notice of a loss in transit until long after the shipment was due to arrive, though the replacement value of the goods was higher when notice of loss was finally received, a loss resulting from delay in delivery being within the class of losses to which such provision refers.—Fahey v. Baltimore & O. R. Co. Md., 114 Atl. 905.

12.——Duty to Accept.—Generally a court may compel a carrier in the exercise of its public duty to accept goods tendered to it for shipment, and thus impose on it the absolute duty to deliver them at their designated destination. —Mobile & O. R. Co. v. Zimmern, Ala., 89 So. 475.

13.——Liability of Initial Carrier.—Since the passage of the act of 1906, from which § 2777 of the Civil Code of 1910 was codified, the initial carrier in an interstate shipment "is liable for loss occasioned anywhere en route, whether on its own lines or not, where it voluntarily receives the shipment, notwithstanding an agreement or stipulation in a bill of lading limiting liability to loss, damage, or injury occurring on its own lines."—Heath v. Sandersville R. Co., 23 Ga. App. 255 (5), 98 S. E. 92. Director General of Railroads v. Beard, Ga., 108 S. E. 310.

14.——Limitation of Liability.—While a common carrier may charge a rate for transporting of freight, to be determined according to the value of the article shipped, the carrier cannot, by an arbitrary agreement as to the value of

the article, limit its liability for its loss or damage through the fault of the carrier.—Bailey v. American Ry. Express Co., Ga., 108 S. E. 303.

15. **Charities**—Gift to Town.—Under Pub. St. c. 40, §1, authorizing towns to purchase and hold real and personal estate for the public uses of the inhabitants, a town may acquire property under a will bequeathing to it the residue of testator's estate on condition that it keep his burial lot in proper repair by consenting to act as trustee of the fund for such purpose, since the statute cannot be considered as authorizing towns to hold only such property as they have acquired by bargain and sale.—Petition of Tuttle, N. H., 114 Atl. 867.

16. **Chattel Mortgages**—Conditional Sale.—Where manufacturer of automobiles drew drafts on a sales agent with bill of lading attached and the bank paid such drafts transmitting the funds directly to the manufacturer and allowing the agent to take possession and resell the automobiles, held, that the transaction was one of conditional sale and not a contract for an equitable mortgage, notwithstanding the sales agent executed note for the advances; the bank reserving title.—Sternberg v. City Nat. Bank of Ft. Smith, Ark., 233 S. W. 691.

17. **Commerce**—Order of Interstate Commerce Commission.—A finding by the Interstate Commerce Commission that a prior order making an allowance to tap lines for the haul of cars from place of loading to the junction point, based on mileage, covered only the direct movement from loading to junction point, and did not entitle a tap line to include additional distance necessary to reach a weighing scale, on the ground that it was not shown to be a necessary movement by such line, held correct as matter of law and not reviewable on the facts, where all the evidence on which it was based is not before the court.—Louisiana & P. B. Ry. Co. v. United States, U. S. D. C., 274 Fed. 370.

78. **Constitutional Law** — Investigation of Strikes.—G. L. c. 150, § 3, authorizing the board of counciliation and arbitration to investigate the cause of any strike or lockout where more than 25 persons are employed, ascertain which party is mainly responsible, or blameworthy, and make and publish a report assigning responsibility, is valid under Const. pt. 2, c. 1, § 1, art. 4, authorizing the General Court to pass laws for the good and welfare of the commonwealth, since a strike involving more than 25 employees is of sufficient public concern to justify an impartial investigation, in view of the disorder and violence frequently accompanying strikes.—Moore Drop Forging Co. v. Fisher, Mass., 132 N. E. 169.

19.——Right of Appeal.—That part of § 16, chapter 113, House Bill No. 276, Sess. Laws 1917, which attempts to limit the right of a person to appeal from judgments of courts not of record in civil cases where the amount involved in the appeal, exclusive of interest and costs, does not exceed $100, violates the constitutional right of appeal guaranteed by § 19, article 2, of the Bill of Rights, and is void.—Peterman v. Chapman, Okla., 200 Pac. 776.

20. **Contracts**—Mutuality.—A contract whereby a glue factory agreed to sell to a jobber who was not engaged in any business requiring the use of glue, but desired the product merely for resale, all the jobber's requirements of glue at a stated price, without any stated consideration paid by the jobber and without any promise by him to take any glue, lacks mutuality, and is not enforceable against the factory.—Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory., N. Y., 132 N. E. 148.

21.——Mutuality.—A contract to purchase the entire output of a plant for a given period is not void for want of mutuality.—Oldershaw v. Kingsbaker Bros. Co., Cal., 200 Pac. 729.

22. **Corporations**—Corporate Seal.—The presence of the seal of a corporation is prima facie evidence of the power of the officers affixing it to transact the business evidenced by the documents to which the seal is affixed.—San Ramon Valley Bank v. Walden Co., Cal., 200 Pac. 662.

23. **Customs Duties**—Unlawful Use of Vehicle.—The provisions of the customs laws, providing that every vehicle carrying merchandise subject to duty or unlawfully imported shall be subject to seizure and forfeiture etc., have been repealed, in so far as they related to intoxicating liquors imported into the United States for beverage purposes, by the National Prohibition Act, popularly known as the Volstead Act, which covers the subject-matter fully in title 2, § 25.—United States v. One Touring Car, U. S. D. C., 274 Fed. 473.

24. **Divorce**—Undivided Remainder in Estate.—Where an unambigous will, by the terms of which the real estate thereby devised becomes equitably converted into personalty, has been admitted to probate without objection, and the estate thereby conveyed has been fully ascertained and inventoried by the executor, and all debts have been paid, and administration has been fully completed except final distribution, which is delayed only by the existence of the life estate, an undivided remainder in the estate is not in the custody of the county court so that the district court may not award it to the wife of the remainderman in a suit by her for divorce.—Maxwell v. Maxwell, Neb., 184 N. W. 227.

25. **Electricity**—Rates.—Under Code Civ. Proc. § 449, requiring actions to be prosecuted by the real party in interest and § 448, authorizing one to sue for the benefit of all where the cause of action is common, a city which is not bound by the rates specified in the schedules filed by a gas and electric company with the Public Service Commission cannot sue as the representative of consumers to enjoin collection of such rates.—City of Oswego v. People's Gas & Electric Co., N. Y., 190 N. Y. S. 39.

26. **Eminent Domain**—Abutting Property.—Where the owner of an abutting tract is damaged by the location of switchyards, roundhouse, coal schutes, pits, etc., his right of recovery is not governed by the law relating to recovery for damages caused by a nuisance, but is governed by the law of compensation for damages sustained by the location and necessary operation of a public service or utility. The constitution provision that "private property shall not be taken or damaged for public use without just compensation" means that the public shall neither take nor damage private property for public use without justly compensating the owner thereof.—St. Louis & S. F. R. Co. v. Ledbetter, Okla., 200 Pac. 701.

27. **Executors and Administrators**—Appointment of Widow.—Widow cannot be denied appointment because of speculation that she will mismanage estate or prove unfit.—Maddox v. Maddox, Ga., 108 S. E. 304.

28. **Frauds, Statute of**—Memorandum.—The note or memorandum of sale required by the statute must state the contract with such certainty that its essentials can be known without aid of parol proof or by a reference therein to some other writing or thing certain, and such essentials must at least consist of the subject, terms of the sale, and parties to it, so as to furnish evidence of a complete agreement.—Gendleman v. Mongillo, Conn., 114 Atl. 914.

29.——Written Contracts.—C. S. § 988, requiring contracts to sell or convey land to be in writing, refers only to a case where, as a result of a sale or exchange, a conveyance from one to the other of the contracting parties is contemplated, and not to an agreement for one of the parties to furnish the money to take up an option for land which the other had and take title in his name and divide the profits on a resale.—Newby v. Atlantic Coast Realty Co., N. C., 108 S. E. 323.

30. **Gas**—Obligation to Give Service.—The commission does not have power to compel by order a gas company which is not a pipe line company, to furnish a supply of natural gas to another gas company, to enable such other gas company to comply with its contract to supply a municipality and its inhabitants.—Village of St. Clairsville v. Public Utilities Commission, Ohio, 132 N. E. 151.

31. **Rates.**—Where Laws 1906, c. 125, set the rate for the use of gas at $1 per thousand cubic feet, and this was repealed by Laws 1916, c. 604, and Laws 1917, c. 666, setting the rate at

vice Commission has sole power to set a rate either on its own motion or on application of the public utility company under § 66, c. 48, 80 cents per thousand, which was held unconstitutional because confiscatory, there is no valid statutory rate, and hence the Public Service Consol. Laws, and a court of equity is without jurisdiction to fix a rate.—Morrell v. Brooklyn Borough Gas Co., N. Y., 132 N. E. 129.

32.——Rates.—Where Public Service Commission Law, § 66, subd. 12, was in force when the plaintiff city gave its consent to use its streets the statute provision that the defendant could abrogate it as to the rate stipulated to gas consumers, and put in operation a new schedule and reasonable rate on 30 days' notice to the commission under § 65, subd. 1, and 30 lays' publication as required by the Commission, subject to its review under §§ 71 and 72 such provision became a part of consent obligations, so that the city may not enjoin the gas company from increasing its rates without first obtaining the commission's adjudication as to reasonableness.—Town of North Hempstead v. Public Service Corporation of Long Island, N. Y., 132 N. E. 144.

33. **Guaranty** — Valid Consideration. — An agreement of guaranty of payment of promissory note by creditor of maker having property in his hands, was supported by a valid consideration, where the payee of the note agreed not to put into execution a threat made by him to the creditor that he would garnish to satisfy the note, whether such payee could or could not have realized anything or obtained any benefit from an attachment of the property. —Kinney v. Jos. Herspring & Co., Cal., 200 Pac. 737.

34. **Innkeepers**—Entry of Guests' Room.—Where a guest of a hotel is occupying his room and is neither engaged in nor permitting improper conduct therein, nor affording any just ground to suspect such, it is an unjustified intrusion upon the guest, and a trespass upon his rights incident to his occupancy of the room for the hotel keeper to effect an uninvited and unpermitted entry into the room for the purpose of ascertaining whether improper conduct on the part of the guest or any one is transpiring therein.—Newcomb Hotel Co. v. Corbett, Ga., 108 S. E. 309.

35. **Insurance**—Collision.—Where edge of roadway on which automobile had been swerved to avoid collision gave way causing automobile to overturn and roll down mountain side, the damage to automobile from contact with the ground and objects thereon while rolling was not "caused solely by collision with another object," within automobile policy.—Mobiad v. Western Indemnity Co., Cal., 200 Pac. 750.

36.——Disability.—Where an insured, within 12 hours after accidentally cutting his finger became sick with blood poisoning, and on the third day took to his bed, which he never left, there was a disability within the meaning of a policy insuring against bodily injury caused by external, violent, and accidental means "which shall from the date of the accident result in continuous disability," the policy not meaning that there must be a disability from the very moment of the injury, that being impossible in case of blood poisoning.—Rorabaugh v. Great Eastern Casualty Co., Wash., 200 Pac. 587.

37.——"Felonious Taking."—Where a contract of insurance insures the proprietor of a jewelry store against robbery committed on his premises which robbery is defined in the policy as "an overt felonious act committed in the presence of a custodian and of which he was actually cognizant," a felonious taking or conversion by a customer of a diamond ring on the premises of the insured, even though done in the presence of the clerk or custodian, as contemplated in the policy, is not such a felonious taking as is insured against by the policy, unless the clerk having the ring in custody had actual knowledge of its felonious taking or conversion.—Van Keuren v. Travelers' Indemnity Co., Ga., 108 S. E. 310.

38. **Libel and Slander.**—Libel per se.—Statement that one in his business as a jeweler was a crook, and that he got away with a diamond intrusted to him, is actionable per se, under Civ. Code, § 46, as calculated to injuriously affect him in his business.—Williams v. Seiglitz, Cal., 200 Pac. 635.

39. **Limitation of Actions**—Claims for Extras. —Statute of limitations started to run as to claims by contractor for extras not provided for in contract when they were done, there being nothing in the contract to postpone payment of them until 15 days after the whole job was completed, which was the time for payment under the contract for work specified.—Maryland Casualty Co. v. West Const. Co., Md., 114 Atl 890.

40. **Master and Servant**—Admissibility of Evidence.—Evidence that a flagman of a railroad train, a few minutes after having attended to his duties, in going back along a track to flag a train, was seen sitting on the outside of the rails of an adjacent track on the projecting cross-ties, and that shortly after a train had passed over the latter track the flagman was found lying by the track unconscious, with such a wound in his head as could have been made by a passing train, warrants the inference that he was injured from being struck by a passing train.—Payne v. Young Ga., 108 S. E. 312.

41.——Assumption of Risk—If there was a custom of the owner of sheep to come to the herder's help and protection on the range during a storm, which may reasonably have warranted his going out in a cold storm after the sheep which had strayed from the camp, it cannot be said as a matter of law that he assumed the risk, where the aid did not come.—Lemos v. Madden, Wyo., 200 Pac. 791.

42.——Casual Employment.—An owner, who lets house for profit, and at irregular times, when demanded, has labor performed in the repair thereof, is not engaged in the prosecution of a "trade" or "business" within the Workmen's Compensation Act, upon which a charge as compensation for injury sustained by an employee casually engaged in doing such work can be imposed.—Ford v. Industrial Accident Commission, Cal., 200 Pac. 667.

43.——Compliance With Statute.—Under Crawford & Moses' Dig. § 7284 requiring not less than 200 cubic feet of air per minute to pass each working place in mines, it is no defense to an action for negligence based on noncompliance with the statute that it is not practical to comply therewith; this being a question for the Legislature.—Central Coal & Coke Co. v. Barnes, Ark., 233 S. W. 683.

44.——Employers' Liability Act.—Under Employers' Liability and Workmen's Compensation Act, § 4, providing that a right of action at common law for damages caused by injury to a workman shall not be affected by the act, unless the workman shall avail himself of the act, the answer of the workman that he claims no compensation under the act prevents the court from having jurisdiction in the employer's suit under the act to determine the compensation.—Sullivan Machinery Co. v. Stowell, N. H., 114 Atl. 873.

45. **Mechanics Liens**—Description of Land.—Where there was no fence, nor any mark or stake on the surface of land, to show the boundaries of a lot on which a house was being erected, and there was no plan in the possession of the contractors, showing any division of the land into separate lots a petition describing the land on which the lien was sought by the description by which it was conveyed to the owner was sufficient, though one orally contracting to buy the land had divided it into lots.—Bordier v. Davis, Mass., 132 N. E. 171.

46. **Municipal Corporations**—Judicial Power. —Under Burns' Ann. St. 1908, § 8716, relative to the appointment of appraisers to reassess the benefits from street improvements upon the petition of property owners, the court's only authority is to appoint the appraisers and adjudicate the costs incident to the review, and is under no duty to consider the report and has no power to reject or approve it.—City of Indianapolis v. State, Ind., 132 N. E. 165.

47.——Power to Tax.—The word "assessment," as used in the Constitution of the state in § 5 of article 9 has the double significance of listing and valuing property for the purpose of apportioning a tax upon it according to valuation, as well as determining the amount of money to be raised by exercise of the taxing

power.—Town of Auburndale v. Cline, Fla., 89 So. 427.

48.——Public Utility.—The "Home Rule Law," Laws 1913, c. 247, does not create such an interest on the part of a city as will permit it, in a suit by a citizen to enjoin collection of a rate by a public utility company, whose franchise comes from the state, to intervene under Code Civ. Proc. § 452, which provides that a party having an interest in litigation may be brought in on his application; "interest" as used in the statute meaning a property interest, and hence does not apply to the city, which is given no power over the rates of public utilities, and which is not affected by the rate as a consumer.—Morrell v. Brooklyn Borough Gas Co., N. Y., 132 N. E. 130.

49. **Physicians and Surgeons**—Validity of Statute.—St. 1917, c. 218, § 1, authorizing the board of registration in medicine to revoke or cancel any certificate, registration, or license for deceit, malpractice, or gross misconduct in the practice of the profession, is not invalid, as soundness of moral fibre is as essential to the public health as medical learning, and it is for the Legislature to determine within reasonable bounds what the tests for moral character shall be.—Lawrence v. Briry, Mass., 132 N. E. 174.

50. **Pleading**—Mutual Mistake.—Fraud or mutual mistake cannot be shown under a general denial in a reply pleading an answer to a settlement.—Stuart v. Torrey, Neb., 184 N. W. 215.

51. **Principal and Agent**—Relation Under Contract.—An agreement between an oil company and another, by which he undertook to handle delivery of oil and to make sales on a commission basis, using his own teams and vehicles and employing and discharging his own servants, subject to directions of the company's representatives, construed, and held to create the relation of principal and agent so as to render the company liable to a customer for damages by a fire set by an explosion from negligent delivery by the servants employed.—Magnolia Petroleum Co. v. Johnson, Ark., 233 S. W. 680.

52. **Railroads**—Contributory Negligence.—In action for personal injuries received in the nighttime when plaintiff's automobile ran into an electric light pole erected by defendant power company at defendant railroad station, where plaintiff had taken a passenger, the mere fact that the driver of the car could have seen the pole before he ran into it while traveling at five miles an hour, or in low, was not sufficient to nonsuit him, since, to justify that action, court must be able to say that, not only could he have seen the pole, but also that had he used reasonable care under all the circumstances he would have seen it in time to avoid hitting it.—Luckkart v. Director General of Railroads, Wash., 200 Pac. 564.

53.——Federal Control.—In an action against the Director General of Railroads, no recovery can be had of a penalty imposed for violation of a state statute, as distinguished from compensatory damages.—Bliss v. Oregon Short Line R. Co., Idaho, 200 Pac. 721.

54.——Federal Control.—Section 206 (f) of the act of Congress passed February, 28, 1920, which provides that "the period of federal control shall not be computed as a part of the periods of limitations in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to federal control," applies only to federal courts.—Georgia Southern & F. Ry. Co. v. Smiley, Ga., 108 S. E. 273.

55.——Last Clear Chance.—That the fireman on a train while the whistle was being blown saw plaintiff slowly approaching a crossing 350 or 400 feet ahead in an automobile and took no action to stop the train held not to tend to support an allegation of negligence under the "last chance" doctrine on the ground that those in charge of the train saw plaintiff in a dangerous position and did not try to avoid his injury, the fireman being justified in supposing that he would stop before reaching a point of danger.—Sutherland v. Payne, U. S. C. C. A., 274 Fed. 360.

56. **Sales**—Conversion.—Notwithstanding the requirement of Code Civ. Proc. § 367, that every action be prosecuted in the name of the real party in interest, one in the rightful possession of an automobile as a purchaser from the registered owner, though not complying with the requirements of the Vehicle Act, § 8, as amended by St. 1917, p. 391, as to transfer of a registered car, may sue in replevin or for conversion of the car, for actual possession of a chattel at the time of conversion thereof will sustain trover, except as to the true owner, or one claiming under him, though the title be in a third person.—Moody v. Goodwin, Cal. 200, Pac. 733.

57. **Specific Performance**—Arbitration Clause.—The presence of an arbitration clause in a contract does not necessarily prevent the court from granting specific performance, and it is only where the act to be performed by the board of arbitrators is of the essence of the contract that the court will refuse to act.—Nakdimen v. Atkinson Improvement Co., Ark., 233 S. W. 694.

58.——Delay.—Where time for payment of remaining purchase money ($54,700) was fixed by a contract as June 1st, $1,000 having been paid down, and time was first extended to June 7th, and then to June 14th, on which latter date defendant seller contracted for sale of the property to third persons, held that the lapse of time under the circumstances was a sufficient bar to a decree for specific performance, such purchase money not having been tendered.—De Crette v. Bonaparte, Md., 114 Atl. 880.

59. **Statutes**—Obligations of Village.—So much of Laws 1911, c. 513, as makes reasonable compensation for additional work, labor, and services in connection with the work covered by the terms of the contract thereby legalized a legal and binding obligation of the village of Port Chester is valid, under Const. art. 3, § 16, as such services are mentioned in the title and embraced in the general subject of the act, and such general subject is single.—Gaynor v. Village of Port Chester, N. Y., 132 N. E. 145.

60.——Titles and Subjects.—Acts 1916, c. 30, does not violate Const. art. 3, § 29, in that according to the title the referendum is to be of the question "whether or not the sale, manufacture for sale and transportation for sale of alcoholic, spirituous, vinous, malt and intoxicating liquors for beverage purposes shall be forever prohibited in said political units," whereas § 5 provides that it shall be unlawful to manufacture for sale, sell, or purchase for sale, or otherwise dispose of any spirituous, vinous, fermented, distilled or malt liquors, or "intoxicating bitters, or liquid mixtures, whether patented or not, which will produce intoxication," in such political units.—Kelly v. State, Md., 114 Atl. 888.

61. **Trial**—Statement of Counsel.—In a servant's action under the Employers' Liability Act for injuries, where defendant employer's counsel compared the action of the defendant in sprinkling a floor (which sprinkling had caused the injury) with that of farmers and storekeepers, and plaintiff's counsel said that any suggestion about the storekeeper or the farmer had no application, and defendant's counsel knew it, such statement by plaintiff's counsel was not misleading or prejudicial to defendant.—Watts v. Derry Shoe Co., N. H., 114 Atl. 859.

62. **Vendor and Purchaser** — Anticipatory Breach.—Since, to constitute an anticipatory breach, refusal to perform must be positive and unconditional, a purchaser's demand for repayment of his deposit on his discovering defects in title before date of performance was not, as respects the purchaser's right to recover his deposit for the vendor's breach, an anticipatory breach as a matter of law, where both before and after such demand he told the vendor that what he wanted was either the property or his money.—Friedman v. Katzner, Md., 114 Atl. 884.

63. **Wills**—"Child or Children."—In a devise of a remainder, the expression "child or children" cannot be construed to include grandchildren.—Hunt v. Wickhan, N. Y., 190 N. Y. S. 16.